

STATE OF MICHIGAN
COURT OF APPEALS

LISA MITCHELL, Individually and as Next
Friend of LAVALE STEVENSON, a Minor,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

FOR PUBLICATION
October 5, 2004
9:10 a.m.

No. 247074
Wayne Circuit Court
LC No. 01-117077-NO

Official Reported Version

Before: Jansen, P.J., and Meter and Cooper, JJ.

METER, J.

Defendant appeals as of right from an order denying its summary disposition in this negligence action involving an alleged injury that occurred on a "berm"—a strip of land between a public road and a sidewalk.¹ Defendant argues that the trial court erred in holding that a berm is included in the definition of "highway" in MCL 691.1401(e) and that, accordingly, the highway exception to governmental immunity applies to this case. Defendant argues that a berm is not in fact considered part of a highway, that the highway exception to governmental immunity does not apply to this case, and that it therefore is immune from tort liability under MCL 691.1407. We agree and therefore reverse.

I. Facts

In July 1997, LaVale Stevenson, a minor, was riding his bicycle westbound on the south side of Evanston Street in Detroit when an eastbound vehicle approached him. Stevenson jumped over the curb and landed on the berm in order to maintain a safe distance from the

¹ For purposes of this opinion, the term "berm" will be used to represent the strip of grass between a public road and a sidewalk. This Court has used the term "berm" to represent this area. See *Michonski v Detroit*, 162 Mich App 485, 488; 413 NW2d 438 (1987). The actual definition of "berm" is "a level strip of ground at the summit or sides, or along the base, of a slope" or "the shoulder of a road." *Random House Webster's College Dictionary* (1997).

vehicle. The Detroit Water Department had done some excavating on the berm earlier that day to fix a water main leak. The water department dug a large hole to work on the leak and, when finished, filled the area with sand. Stevenson's back tire landed in the hole and began sinking. Stevenson sunk up to his chin before a local woman came to his rescue and pulled him out of the hole. Stevenson claimed that there were no warnings or barricades surrounding the hole. Stevenson claimed that, as a result of the incident, he suffered injuries to his entire body, as well as severe psychological injuries.

In 2001, plaintiff, individually and as next friend of Stevenson, sued defendant, alleging that it was negligent in maintaining and repairing the public streets and highways within its jurisdiction. Defendant denied liability, arguing, in part, that governmental immunity applied.

Defendant then filed a motion for summary disposition, arguing that a berm is not included in the definition of "highway" under MCL 691.1401(e) and that the highway exception to governmental immunity therefore did not apply to this case. Defendant argued that, because the alleged injury occurred on the berm adjacent to Evanston Street, it was immune from tort liability under MCL 691.1407. Plaintiff responded to defendant's motion for summary disposition by arguing that, according to binding Michigan case law, a berm located next to a street is covered under the highway exception to governmental immunity.

The trial court denied defendant's motion for summary disposition based on governmental immunity, holding that a berm is a natural extension of a sidewalk and is therefore included in the definition of highway under MCL 691.1401(e).

II. Standard of Review

We review de novo a trial court's grant or denial of summary disposition. *Haliw v Sterling Hts*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion brought under MCR 2.116(C)(7), "[w]e consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence." *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). In the instant case, we must review the pleadings and documentary evidence to determine whether the nonmoving party established an exception to governmental immunity. *McGoldrick v Holiday Amusement, Inc*, 242 Mich App 286, 289-290; 618 NW2d 98 (2000). The determination of the applicability of the highway exception to governmental immunity is a question of law subject to review de novo on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

III. Analysis

The governmental immunity act, MCL 691.1407, provides that governmental agencies, including municipalities such as defendant, are immune from tort liability whenever they are engaged in the exercise or discharge of a governmental function, except as otherwise provided in the act. *Weakley v Dearborn Hts (On Remand)*, 246 Mich App 322, 325; 632 NW2d 177 (2001). Governmental function is defined, in part, as an "activity that is expressly or impliedly authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f).

It is not disputed that defendant engaged in a governmental function when its water department took steps to repair the water main break on Evanston Street. What is in dispute is whether one of the statutory exceptions to governmental immunity applies to this case.

In an attempt to avoid governmental immunity, plaintiff relied on the highway exception, MCL 691.1402, which provides, in relevant part:

[E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

A "highway" is defined under the act as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1401(e). Defendant argues that the statute should be construed narrowly and that a berm is not within the plain meaning of the definition of a "highway." Plaintiff claims on appeal that a berm is a natural extension of the sidewalk and therefore is included within the definition of a "highway."

In dealing with issues regarding the highway exception, we must abide by the principles that the immunity conferred on governmental agencies is broad and that the statutory exceptions should be narrowly construed, in accordance with their plain language. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 149-151, 158; 615 NW2d 702 (2000). The *Nawrocki* Court noted that "such an approach will maintain fidelity to the requirements set forth by the Legislature, while providing the lower courts with a clearer standard to follow when applying the highway exception in individual cases." *Id.* at 150. The Court further noted that because MCL 691.1402(1) "is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute." *Id.* at 158-159.

This Court applied the above principles to the highway exception in *Weaver v Detroit*, 252 Mich App 239; 651 NW2d 482 (2002). In *Weaver*, this Court held that the highway exception to governmental immunity does not apply to streetlight poles, because they are not specifically included within the definition of the term "highway" under MCL 691.1401(e). *Weaver, supra* at 245-246. The *Weaver* Court emphasized the *Nawrocki* Court's statement that "'the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed.'" *Id.* at 245, quoting *Nawrocki, supra* at 158 (emphasis in *Nawrocki*). The *Weaver* Court stated, "we reject as inconsistent with the plain language of the statute the holding . . . that a streetlight pole is part of the 'highway' because it is not specifically excluded from the definition of 'highway' in MCL 691.1401(e)." *Weaver, supra* at 246.

The reasoning from *Weaver* applies with equal force to the instant case. The highway exception to governmental immunity does not apply here because the plain language of MCL 691.1401(e) does not support the conclusion that berms are included within the definition of the

term "highway." *Weaver, supra* at 245-246. A highway is currently defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). Alleys, trees, and utility poles have specifically been excluded from the definition of highway. MCL 691.1401(e). A berm, as it is defined for purposes of the instant case, does not constitute a "highway." The plain language of the statute simply does not support the conclusion that berms are included within the statutory definition of the term "highway."

In support of her argument, plaintiff cites *Michonski, supra*, *Messecar v Garden City*, 172 Mich App 519; 432 NW2d 311 (1988), and *Ali v Detroit*, 218 Mich App 581; 554 NW2d 384 (1996). We conclude that none of these cases can logically be used to uphold plaintiff's argument. In *Michonski, supra* at 488, 493-495, this Court allowed the plaintiff to maintain a tort claim against the city for an accident occurring when a light pole located on a berm collapsed. A careful reading of the Court's opinion demonstrates that it relied heavily on the then-existing fact that the city was responsible for maintaining light poles. *Id.* As noted, this notion no longer holds true. *Weaver, supra* at 245-246. Moreover, the *Michonski* decision was issued in 1987 and therefore is not strictly binding on this Court under MCR 7.215(J)(1) (providing that the Court of Appeals must follow rules of law established in published opinions of the Court of Appeals issued on or after November 1, 1990, that have not been reversed or modified by the Supreme Court or by a special panel of the Court of Appeals). *Michonski* lends no binding support to plaintiff's argument.

In *Messecar, supra* at 522, the Court stated that "[t]he defective highway exception extends to berms[,]" but it cited only *Michonski* in support of this proposition. As discussed, the central holding of *Michonski* is no longer tenable in light of *Weaver*. Therefore, the reasoning of *Messecar* lends no binding support to plaintiff's argument. Moreover, *Messecar*, like *Michonski* and unlike *Weaver*, was issued before the triggering date set in MCR 7.215(J)(1).

Finally, in *Ali, supra* at 589, this Court, citing *Messecar*, stated that a berm could be considered a natural extension of a sidewalk. This statement from *Ali*, however, constituted obiter dictum because it was not necessary for the resolution of the case. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 378-379; 666 NW2d 251 (2003). Accordingly, *Ali* lends no binding support to plaintiff's argument.

Weaver and *Nawrocki* constitute the controlling precedent here. Because the immunity conferred on governmental agencies is broad, and because the statutory exceptions should be narrowly construed in accordance with their plain language, we conclude that a berm is not included within the definition of the term "highway" and is thus not included within the highway exception to governmental immunity. *Nawrocki, supra* at 149-151; *Weaver, supra* at 245-246.

Accordingly, the trial court erred in denying defendant's motion for summary disposition, because defendant was immune from liability in this case.²

Reversed.

Jansen, P.J., concurred.

/s/ Patrick M. Meter

/s/ Kathleen Jansen

² We decline to address the unpreserved additional issue that plaintiff raises on appeal. *Bombalski v Auto Club Insurance Ass'n*, 247 Mich App 536, 546; 637 NW2d 251 (2001). We further note that this Court recently convened a conflict panel under MCR 7.215(J)(3) to determine if the panel in *Marchyok v Ann Arbor*, 260 Mich App 684; 679 NW2d 703 (2004), was correct in holding that municipalities are immune with respect to injuries resulting from defective traffic control devices. *Johnson-McIntosh v Detroit*, 261 Mich App 801 (2004). While expressing no opinion regarding the proper outcome of the conflict panel, we nevertheless note that a defective "berm" as defined in the instant case is fundamentally different from a defective traffic control device, which can directly affect a person's use of the street itself.